

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Cellular Service and Other Commercial Mobile	)	WT Docket No. 97-112
Radio Services in the Gulf of Mexico	)	
	)	
Amendment of Part 22 of the Commission's	)	CC Docket No. 90-6
Rules to Provide for Filing and Processing of	)	
Applications for Unserved Areas in the Cellular	)	
Service and to Modify Other Cellular Rules	)	

**VOICESTREAM WIRELESS CORPORATION  
PETITION FOR RECONSIDERATION**

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April 3, 2002

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Exhibit 1: Declaration of Mark Cosgrove

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VoiceStream Wireless Corporation ("VoiceStream")<sup>1</sup> petitions the Commission to reconsider its *Report and Order* in this proceeding insofar as that *Order* addressed the provision of Personal Communications Services ("PCS") in the Gulf of Mexico.<sup>2</sup> As VoiceStream demonstrates below, the Commission, without discussion and perhaps unknowingly, reduced the right of existing PCS licensees to provide their authorized services in the Gulf.

**I. THE COMMISSION'S DECISION REDUCING THE RIGHTS OF EXISTING PCS LICENSEES IS UNEXPLAINED**

Prior to the *Gulf Order*, PCS licensees had a right to provide their services throughout the Gulf of Mexico on a primary basis, subject only to the obligation to relocate preexisting fixed

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<sup>1</sup> VoiceStream, combined with Powertel, Inc., is the sixth largest national wireless provider in the U.S. with licenses covering approximately 96 percent of the U.S. population and currently serving over seven million customers. VoiceStream and Powertel are wholly-owned subsidiaries of Deutsche Telekom, AG and are part of its T-Mobile wireless division. Both VoiceStream and Powertel are, however, operated together and are referred to in this request as "VoiceStream."

<sup>2</sup> *Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, WT Docket No. 97-112 and CC Docket No. 90-6, *Report and Order*, FCC 01-387 (Jan. 15, 2002), summarized in 67 Fed. Reg. 9596 (March 4, 2002) ("*Gulf Order*").

microwave licensees pursuant to the microwave relocation rules. In the *Gulf Order*, the Commission announced that PCS licensees may provide service in the Gulf on a “secondary basis” only.<sup>3</sup> The Commission further stated that it may establish a separate PCS license encompassing the Gulf at a later date – even though existing PCS licensees already possess the right to serve this area.<sup>4</sup> These rulings constitute clear error and warrant reconsideration.

#### **A. Background Facts**

The Commission licensed PCS using a combination of MTA and BTA service areas.<sup>5</sup> Several insular areas (*e.g.*, Guam, Virgin Islands, American Samoa) were not encompassed in any MTA or BTA, so the Commission established separate PCS licenses for these areas.<sup>6</sup> In contrast, the Commission decided not to establish separate PCS licenses for the Gulf of Mexico. Although it did not state a reason for not creating separate Gulf licenses, the Commission undoubtedly was influenced by the then 10-year ongoing interference problems that cellular carriers faced as a result of the Commission’s decision to license a separate cellular area for the Gulf.<sup>7</sup> Establishment of separate PCS Gulf licenses would have resulted in the same interference problems that cellular carriers had been encountering.

The first PCS auction (Auction No. 4 involving the A and B licenses) commenced in December 1994. Auction bidders reasonably assumed that available coastal PCS licenses included the right to serve the Gulf of Mexico, given the Commission’s decision not to establish a separate license for the Gulf, given the long distances that radio transmissions at authorized levels

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<sup>3</sup> See *Gulf Order* at ¶ 46.

<sup>4</sup> See *id.* at ¶ 45.

<sup>5</sup> See *Second PCS Order*, 8 FCC Rcd 7700, 7732-33 ¶¶ 73-77 (1993), *aff’d*, 9 FCC Rcd 4957, 4987-88 ¶¶ 75-79 (1994).

<sup>6</sup> See *PCS Reconsideration Order*, 9 FCC Rcd at 4969 n.23. See also 47 C.F.R. § 24.202(a)(1)-(5).

<sup>7</sup> See, *e.g.*, *Petroleum Communications*, 54 R.R.2d 1020 (1983); 56 R.R.2d 1651 (1985); 1 FCC Rcd 511 (1986); 2 FCC Rcd 3695 (1987); 3 FCC Rcd 399 (1988); 4 FCC Rcd 4085 (1989).

travel over water, and given that Commission rules limiting field strength at MTA/BTA boundaries do not apply to areas like the Gulf where there are no adjacent licensed areas.<sup>8</sup>

The Commission expressly confirmed this interpretation in its 1996 *Mobile Oil Order*, a decision released four months before commencement of the 10 MHz PCS auction (Auction No. 11). The Commission there stated unequivocally:

Unlike cellular mobile service, there is no PCS licensee for the water areas of the Gulf of Mexico. *Entities eligible to serve the Gulf of Mexico are the licensees of BTAs bordering the Gulf.*<sup>9</sup>

Firms acquiring PCS licenses along the Gulf coast thereafter spent significant sums relocating Gulf-based microwave systems that were using their spectrum so they could commence their PCS services without interference from these systems.

Continuing interference problems between coastal cellular carriers and Gulf-based cellular carriers led the Commission to commence this rulemaking proceeding in 1997.<sup>10</sup> As part of this proceeding, the Commission asked almost in passing “whether sufficient demand exists to justify an extension of broadband and narrowband PCS services into the Gulf of Mexico.”<sup>11</sup>

In response, PCS licensees uniformly pointed out in their comments that the Commission could not now establish separate PCS licenses for the Gulf given that they already possessed the right to serve the Gulf.<sup>12</sup> As Aerial Communications, Inc., and Western PCS, which have since

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<sup>8</sup> Rule 24.236 limits field strength “at any location on the border of the PCS service area . . . unless the parties agree to a higher field strength.” 47 C.F.R. § 24.236. Since there was no Gulf PCS license, bidders for the coastal PCS licenses reasonably set their bids on the assumption they would never have to protect any seaward PCS licensee.

<sup>9</sup> *Mobile Oil Telcom*, 11 FCC Rcd 4115, 4116 n.10 (April 10, 1996)(emphasis added).

<sup>10</sup> *See Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, WT Docket No. 97-122, *Second Further Notice of Proposed Rulemaking*, 12 FCC Rcd 4576 (1997).

<sup>11</sup> *Id.* at 4599-4600 ¶ 60. *See also Gulf Order*, Appendix D, Final Regulatory Flexibility Analysis at ¶ 6 (“The *Second Further Notice* also requested comment regarding *possible* operations in the Gulf by Commercial Mobile Radio Services (CMRS) licensees for services other than cellular.”)(emphasis added).

<sup>12</sup> *See, e.g.*, Aerial Communications and Western PCS Reply Comments (Aug. 4, 1997); AT&T Wireless Further Reply Comments at 3-4 (May 30, 2000); BellSouth Reply Comments at 1-3 (Aug. 4, 1997); PrimeCo Ex Parte (Oct. 7, 1998); PrimeCo Ex Parte (Feb. 4, 1998); PrimeCo Reply Comments (Aug. 4, 1997); Sprint PCS Reply Comments

merged into VoiceStream, advised the Commission, “PCS licenses for the MTA/BTA service areas encompassing the Gulf coast are already authorized to serve the Gulf of Mexico”.<sup>13</sup>

[I]ncumbent licensees have both the licensing rights and the technical capacity to provide continuity of reliable service coverage to subscribers even if they should need service in portions of the Gulf beyond the maritime boundaries of existing MTA and BTA service areas.<sup>14</sup>

The Commission did not acknowledge this argument in its recent *Gulf Order*. Providing no elaboration, the Final Regulatory Flexibility Analysis accompanying the *Order* briefly noted, without any discussion or response, the fact that PCS licensees had argued “incumbent licensees with markets adjacent to the Gulf are already authorized to serve the Gulf’s offshore areas.”<sup>15</sup> In the *Order*, however, the Commission instead announced, again without any discussion, that PCS licensees now held the right to serve the Gulf on “a secondary basis” only, and that the Commission may establish separate PCS licenses in the Gulf at a later date.<sup>16</sup>

**B. The Commission Should Now Clearly Address the Argument Made by Existing PCS Licensees That They Already Have the Right to Serve the Gulf Waters**

Appellate courts have held repeatedly that the Administrative Procedures Act (“APA”) imposes on the Commission “the duty to respond to significant comments”.<sup>17</sup>

Notice and comment rulemaking procedures obligate the FCC to respond to all significant comments for “the opportunity to comment is meaningless unless the agency responds to all significant points raised by the public.”<sup>18</sup>

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at 4 (May 30, 2000); Sprint PCS Comments (July 2, 1997); Verizon Wireless Ex Parte at 5-6 (April 2, 2001); Verizon Wireless Comments (May 15, 2000). CMRS carriers other than PCS licensees made the same point. *See, e.g.*, American Mobile Telecommunications Association Ex Parte at 2 (March 18, 1998); Arch Communications Reply Comments (Aug. 4, 1997); Benbow Reply Comments (Aug. 4, 1997); DW Communications Comments at 12-15 (April 10, 2000);

<sup>13</sup> Aerial Communications and Western PCS Reply Comments at 2 (Aug. 4, 1997).

<sup>14</sup> Aerial Communications and Western PCS Comments at 5 (July 2, 1997).

<sup>15</sup> *Gulf Order*, Appendix D at ¶ 11.

<sup>16</sup> *See Gulf Order* at ¶¶ 45-46.

<sup>17</sup> *Alabama Power v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979).

A significant comment is one that “raises points relevant to the agency’s decision and which, if adopted, would require a change in an agency’s proposed rule.”<sup>19</sup> The Commission is “required to give reasoned responses to all significant comments”:

We will therefore overturn a rulemaking as arbitrary and capricious where the [agency] has failed to respond to specific challenges that are sufficiently central to its decision.<sup>20</sup>

The argument made by the six PCS licensees that commented in this proceeding (Aerial Communications, AT&T Wireless, BellSouth, PrimeCo, Sprint PCS and Western PCS) that—“incumbent licensees . . . are already authorized to serve the Gulf’s offshore areas”<sup>21</sup>—certainly constitutes a “significant comment” under the APA. Had it addressed these comments and considered its own precedent from the *Mobile Oil* decision, the Commission would have reached a decision different than the one it did. Specifically, the Commission would have likely reaffirmed that existing PCS licensees already have a right to serve the Gulf on a primary basis and that, as a result, there is no basis to establish separate PCS licenses in the Gulf or to relegate PCS licensees to secondary status in the Gulf.

The Supreme Court has held that an agency action is “arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency.”<sup>22</sup> The court has further ruled that an agency changing course “is obligated to supply a reasoned analysis for the change

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<sup>18</sup> *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987), quoting *Alabama Power v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979), and *HBO v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977).

<sup>19</sup> *HBO v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). See also *Comsat v. FCC*, 836 F.2d 623, 634 (D.C. Cir. 1988).

<sup>20</sup> *International Fabricare v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992).

<sup>21</sup> See n. 12 *supra* and *Gulf Order*, Appendix D at ¶ 11 [emphasis added].

<sup>22</sup> *Motor Vehicles Manufacturers Ass’n v. State Farm*, 463 U.S. 29, 43 (1983).

beyond that which may be required when an agency does not act in the first instance.”<sup>23</sup> The PCS licensees’ comments on the crucial issue of authorized service areas were ignored.<sup>24</sup> Rather than a reasoned response to the comments, the Commission instead provided solely a one-sentence, incomplete summary of the commenters’ argument in the Final Regulatory Flexibility Analysis. Clearly, providing a one-sentence, incomplete summary of the PCS licensee arguments in the Final Regulatory Flexibility Analysis does not even remotely approach the reasoned response that a “significant comment”, as was provided by the six PCS licensees, is entitled to under the APA.<sup>25</sup> The Commission’s failure to address at all the substantive legal arguments regarding authorized service areas that PCS licensees made renders the *Gulf Order* arbitrary and capricious as a matter of law.<sup>26</sup> VoiceStream therefore encourages the Commission to address the authorized service area argument now in response to this reconsideration petition.

## **II. IN ANY EVENT, THE COMMISSION SHOULD NOT ESTABLISH SEPARATE PCS LICENSES IN THE GULF OF MEXICO**

The Commission should not establish separate PCS licenses for the Gulf (or relegate existing licensees to secondary status only) even if it revises its prior position and determines that existing PCS licensees do not already possess the right to serve the Gulf waters.

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<sup>23</sup> *Id.* at 42.

<sup>24</sup> The topic of authorized service areas is certainly one that meets the “significant comment” standard, since it would require a change in the proposed rule. See n.19, *supra*.

<sup>25</sup> See n.17, *supra*.

<sup>26</sup> Given that the federal government has received valuable and sizable consideration for issuing PCS licenses along the Gulf coast, licenses that included the right to serve the Gulf waters, these PCS licenses have effectively become a contract between the government and PCS licensees. The Supreme Court has held that the government becomes liable upon breach of contract – even when the contracting agency is prevented from honoring its bargain as a result of subsequent enactments of Congress. See, e.g., *Mobil Oil v. United States*, 530 U.S. 604 (2000) (Department of Interior liable for breach of offshore oil exploration contracts even though breach was caused by subsequent act of Congress); *United States v. Winstar*, 518 U.S. 839 (1996) (Government liable for damages which arose when Congress amended the law, so as to deny certain savings and loans regulatory treatment to which the government had contractually committed itself); *Hughes Communications v. United States*, 998 F.2d 953 (Fed. Cir. 1993) (NASA financially responsible to satellite company for changes in policy triggered by sovereign government actions).



The Commission has recognized that the provision of radio services in the Gulf region poses “unique challenges” because propagation characteristics across water are “unpredictable and are more extensive than contours over land areas.”<sup>27</sup> Commission rules specify the emission levels that PCS licensees may lawfully use.<sup>28</sup> The record evidence is undisputed that PCS signals operating at authorized emissions levels travel much further over water rather than over land.<sup>29</sup> For example, VoiceStream’s GSM signals from its base stations located on the Gulf coast commonly propagate 50-60 kilometers (or 31-37 statute miles) into the Gulf.<sup>30</sup>

If the Commission determines that the boundaries of coastal PCS licenses extend only three-to-ten miles (depending on the state) into the Gulf,<sup>31</sup> and since existing PCS transmissions extend over thirty miles into the Gulf, the establishment of separate PCS licenses in the Gulf would necessarily result in the very intractable interference problems that Gulf and coastal cellular licensees have faced for the past two decades. As one PCS licensee has noted correctly, the establishment of separate Gulf PCS licenses “would create an unnecessary ‘zone of chaos which will undermine the provision of reliable service to land and Gulf-based PCS customers.’”<sup>32</sup>

The Commission addressed this very issue only two years ago in establishing rules governing the 700 MHz band. Recognizing the intractable interference issues that had occurred in cellular services as a result of the establishment of separate Gulf cellular licenses, the Commission determined not to establish separate 700 MHz licenses for the Gulf of Mexico:

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<sup>27</sup> *Gulf Licensing NPRM*, 12 FCC Rcd 4576, 4583 ¶ 13 (1997); *Unserved Cellular Service Area NPRM*, 6 FCC Rcd 6158, 6160 ¶ 14 (1991). See also *Petroleum Communications*, 2 FCC Rcd 3695, 3697 ¶ 17 (1987)(noting the “greatly increased propagation in the Gulf area.”).

<sup>28</sup> See, e.g., 47 C.F.R. § 24.236.

<sup>29</sup> See Sprint PCS Reply Comments at 4 (May 30, 2000). See also Aerial Communications and Western PCS Comments at 5 (July 2, 1997).

<sup>30</sup> Declaration of Mark Cosgrove, attached as Exhibit 1.

<sup>31</sup> See *Gulf Order* at n.75.

<sup>32</sup> PrimeCo Ex Parte at 1 (Oct. 7, 1998).

Having the service area extend into the Gulf will provide service for oil rigs and other mining installations located there without the difficult interference issues that have arisen in the past when one licensee served the Gulf and [a] different licensees the adjoining land.<sup>33</sup>

The same analysis applies with respect to PCS services.

In summary, the Commission decided for good reasons not to establish separate PCS licenses for the Gulf when it established PCS service, and there is no reason for the Commission to change that decision today.

### **III. PCS LICENSE BOUNDARIES OVER WATER SHOULD BE BASED UPON FEDERAL LAW, NOT STATE LAW**

PCS licenses are based on MTAs and BTAs, and MTA/BTA boundaries, in turn, are based on county boundaries. The Commission has recognized that PCS licenses along the Gulf coast “extend over water pursuant to state law.”<sup>34</sup> The problem is that the laws in each state differ, with the result that the coastal water zone for PCS licensees is different depending on the state.<sup>35</sup> The risk also exists that state legislatures may change the boundaries of their claim over adjacent water, action that would change the boundaries of federal radio licensees.<sup>36</sup>

VoiceStream submits that federal licenses over water should be based on federal law rather than state law. For example, in establishing the area where reciprocal compensation rules apply to traffic involving CMRS carriers, the Commission established the applicable local service area based on federal law rather than state law.<sup>37</sup> For the same reasons, the boundaries of PCS licensees over water, whether by the Gulf of Mexico or by the Atlantic or Pacific Oceans,

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<sup>33</sup> *First 700 MHz Service Rules Order*, 15 FCC Rcd 476, 500 n.137 (2000).

<sup>34</sup> *Gulf Order* at ¶ 46.

<sup>35</sup> *See id.* at n.75.

<sup>36</sup> While states may also change the boundaries of counties within their borders, such a change would not affect PCS licensees, because the boundaries of adjacent PCS licensees have already been established.

<sup>37</sup> *See First Local Competition Order*, 11 FCC Rcd 15499, 16014 ¶ 1036 (1996). *See also* 47 C.F.R. § 51.701(b)(2).

should be based on federal law. Use of federal law for establishing the boundaries of federal licensees over water would provide uniformity and would help ensure that federal radio licensees can support U.S. policies over the water areas that it claims sovereign authority.<sup>38</sup>

The United States, consistent with international treaties, has established an Exclusive Economic Zone for waters along its shoreline. As stated by President Reagan in Proclamation No. 5030, the United States exercises the following rights within its Exclusive Economic Zone:

(a) sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and (b) jurisdiction with regard to the establishment and use of artificial islands, and installations and structures having economic purposes, and the protection of the marine environment.<sup>39</sup>

The Exclusive Economic Zone “extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.”<sup>40</sup> A 200-mile coastal zone is the area the Commission once used with mobile satellite licenses (until it expanded the licensed coverage area).<sup>41</sup>

VoiceStream recommends that the Commission clarify that the boundaries of PCS licenses, both MTA and BTA licensees, include all areas encompassed within the Exclusive Economic Zone managed by the United States government.

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<sup>38</sup> Among other things, use of federal boundaries for PCS licensees will facilitate the provision of services to persons operating within U.S. territorial waters, as persons in need of radio services would know immediately who they must contact for needed services.

<sup>39</sup> Proclamation No. 5030, 48 Fed. Reg. 10605 (March 10, 1983).

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., *Land Mobile Satellite Service*, 4 FCC Rcd 6041, 6055 ¶ 97, 6060 ¶ 138 (1989) (FCC authorizes American Mobile Satellite Corporation to operate in U.S. coastal areas up to 200 miles offshore); *AMSC Subsidiary Corporation*, 11 FCC Rcd 6830, 6833 ¶ 9 (1996) (FCC expands AMSC’s water coverage area to any area within the technical service area of its system).

#### **IV. CONCLUSION**

For the foregoing reasons, VoiceStream respectfully requests the Commission to reconsider its *Gulf Order* by reaffirming that PCS carriers licensed to provide service along the Gulf of Mexico already possess the right to serve the Gulf on a primary basis and that no separate PCS license will be established for the Gulf of Mexico.

Respectfully submitted,

**VOICESTREAM WIRELESS CORPORATION**

/s/ Brian T. O'Connor

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## **Exhibit 1**

### **DECLARATION OF MARK COSGROVE**

I, Mark Cosgrove, do state as follows:

1. I am the Director, RF Systems Engineering, for VoiceStream Wireless Corporation at its main headquarters at Bellevue, Washington. I have a Bachelor degree in Electrical Engineering from the University of Essex, UK. I have 15 years experience in the wireless industry. In my position, I have overall responsibility for the design, implementation, and performance of all VoiceStream's PCS systems including those in and around the Gulf of Mexico. VoiceStream and its Affiliates hold a number of PCS licenses covering the coast of the Gulf of Mexico. In this regard, the FCC has declared that coastal PCS licensees are authorized to serve the water areas of the Gulf as well.

2. I am knowledgeable about the issues relative to PCS radio frequency ("RF") and network engineering in coastal and offshore areas, including those of the Gulf. My background and work experience have focused on the GSM (Global System for Mobile) air interface used in the PCS band, including the design of systems to provide GSM service to islands in the Mediterranean Sea and also the design of over-water microwave radio systems between the UK and France. In my current position I am responsible for frequency coordination and interference analysis in the Gulf of Mexico's offshore areas. I am also responsible for microwave clearing of point-to-point operational-fixed microwave licensees in the 1850-1990 MHz band, including relocation activities in the Gulf of Mexico coastal and offshore areas.

3. I have reviewed the foregoing Petition for Reconsideration and I have personal knowledge of the facts contained therein as they relate to VoiceStream. Specifically, VoiceStream currently operate sites with coverage radius of over 50 km (30 miles). The Petition accurately notes that the propagation of GSM signals over water can be greater than 50-60 kilometers (approximately 31-37 statute miles) when the transmitter is positioned at the coast and is operating within authorized emissions levels. Hence, interference from a potential licensee of a separate Gulf PCS license could disrupt the provision of services to VoiceStream's customers, resulting in dropped calls, blocked calls, and degraded call quality.

4. I hereby state that the facts contained in the petition and in this declaration are true to the best of my knowledge, information, and belief.

/s/ Mark Cosgrove  
Mark Cosgrove

Dated: April 2, 2002